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THE HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937

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Scope.—The Hindu Women's Rights to Property Act has been hailed as opening a fresh chapter in the history of women's rights to property and while it has been criticised in some quarters as being revolutionary in character leading to a break up of the Hindu joint family system, according to others it is nothing more than a half-hearted attempt to tackle the problem of women's rights to property. Though the legislation is ambitiously described as the Hindu Women's Rights to Property Act, it deals directly only with the rights of the widow to the property of her husband and incidentally affords recognition of the rights of a pre-deceased son's wife and of the wife of a pre-deceased son's pre-deceased son. No doubt the Bill as introduced by Dr. Deshmukh contained provisions dealing with the position of the daughter in the line of heirs, but they were all withdrawn while the Bill was before the Select Committee of the Legislature. In fact it is stated in the report of the Select Committee:

"We have redrafted the Bill so as to confine the scope of its provisions within the limits foreshadowed in the discussions that took place when the motion for reference to Select Committee was before the House, that is to say, we have dealt *only with the question of giving extended rights to widows.*"

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S. 2 of the Act, however, contains language suggesting a wider scope for the enactment. It provides that when a Hindu dies intestate leaving separate property, the same shall devolve upon his widow along with his lineal descendants. It is well known that the expression "lineal descendants" includes sons as well as daughters. *Bhimnath Missir* v. *Sm. Tara Dasi*[1]. It would thus seem that the Act makes the widow, the sons as well as the daughters, equal sharers of the inheritance, there being nothing in the enactment to suggest any discrimination whatever between sons and daughters. However plausible such a construction may be the Act does not really warrant it. In fact, the expression 'lineal descendants', if literally understood, will take in not merely, the descendants in the first degree but all the descendants of a person irrespective of any question of degree or sex. It certainly cannot be the object of the Act to include all such persons. For one thing if the Legislature intended to introduce such a radical alteration in the existing principles of Hindu Law as regards the rights of daughters, and others, there would have been a specific declaration to that effect and the matter would not be left to mere implication. That apart in S. 3 (2), there is no provision for the daughter becoming entitled in any degree whatsoever to any interest which the deceased might have had in undivided joint family properties at the time of his death and the widow's case alone is provided for. Also S. 3 (3) defining the nature of the interest which a beneficiary under the Act is to take, in terms refers to a widow alone as such a beneficiary. Thus under the Act the only people to derive a benefit are (1) the widow, (2) the widow of a pre-deceased son, and (3) the widow of a pre-deceased son's predeceased son.

Commencement.—The Act does not prescribe any date for its commencement; hence under S. 5 (1) of the General Clauses Act (X of 1897), its provisions come into operation from the 14th of April, 1937, on which date it received the assent of the Governor-General. It is specifically enacted by S. 4 of the Act that its provisions will be inapplicable to the property of any Hindu dying intestate before that date.

Prior Law.—The scope of the Act, the nature and extent of the modifications it has introduced in the principles of

1. (1929) 57 M.L.J. 580: 30 L.W. 75 (P.C.).

Hindu Law as at present administered and the doubts and difficulties it has given rise to can all be appreciated by a brief reference to the prior state of the law. Under the Mithakshara which is followed with local variations by the Hindus almost all over India there exists a marked distinction between property of which a person is exclusively and absolutely seised, such as his self-acquisitions, and the interest which he may have in undivided joint family properties as one who on his birth had become entitled to a share therein. This distinction is vital, in as much as in the latter case according to the Mithakshara it is the family as a unit that constitutes the owner and the interest of each male member thereof is an inchoate right arising no doubt on his birth but capable of ascertainment only on partition and till then susceptible of variation regarding its density according as fresh sharers are born or existing sharers die. On the death of a Hindu male possessing both such types of property the law of inheritance operates regarding the former while there is no such thing as succession in the case of the undivided share which will simply lapse to the surviving sharers. If the deceased left a son, grandson, or great-grandson the latter will represent him in the family; else the collaterals get the benefit of survivorship. A woman had no rights regarding such property, apart from any question of maintenance, irrespective of the degree of kinship in which she stood to the deceased. In other words, women's rights of inheritance to the property of males depended essentially on the school of law by which the deceased was governed, whether he was a follower of one or the other of the two treatises, the Mithakshara and the Dayabhaga.

According to the Dayabhaga which is followed by a majority of the Hindus in Bengal, a person has absolute powers both over his acquisitions as well as over property which he along with his kinsmen may have inherited from his forefathers and in respect of which there has as yet been no division by metes and bounds among the sharers. Under that system a sharer does not acquire by his birth any interest in the property of his father or other ancestors but gets such interest only by and on the death of the latter, and then he takes a fixed, absolute and invariable interest. The result is that on his own death all his properties to whatever category they belong devolve by inheritance only on his heirs, and there is no

such thing as a coparcenership with rights of survivorship *inter se* among the members. Thus while under the Dayabhaga all the properties of a person pass by inheritance on his death, under the Mithakshara the rules of inheritance apply only as regards property of which the deceased was the absolute owner.

When succession fell in, both under the Mithakshara and the Dayabhaga, the wife became the heir only in default of son, grandson, or great-grandson and she took only if she had been chaste up to that time. Hers was a qualified estate, defeasible on (1) an adoption, or (2) re-marriage, or (3) surrender by her in favour of the nearest reversioners, or (4) by her death. She can enjoy the usufruct but cannot alienate the corpus in the absence of legal necessity. If the deceased had left sons, then on a partition among them the wife of the deceased was ordinarily entitled to a share equal to that of a son. She had however no independent right to call for a partition,and till that event she will have a right to maintenance only. A certain amount of difference in judicial opinion exists regarding the application of this principle, as for instance where a person died leaving more than one wife and sons by all or some or one of them, or where after the death of a person the partition was as between his sons and his grandsons by pre-deceased sons, etc. Be that as it may, the practice by which the wife of a deceased person was allotted on a partition among his sons a share equal to that of a son is held to be obsolete in Madras, and under the Dayabhaga law depends on whether she is a mother or a childless wife. Where she had no right to a share, she had generally a right to maintenance.

Changes effected by the Act.—The Hindu Women's Rights to Property Act effects important changes both in the law governing the devolution of a person's separate property as well as in the law governing the interest which he might have in undivided joint family properties. As regards the separate property of a person, in place of the provision that a widow can take only in default of a son, grandson, or great-grandson, the Act provides that the widow shall be entitled to a share in the inheritance *along* with such persons. Secondly, the Act confers for the first time in all provinces of India and under

all schools of law a heritable capacity on the widow of a pre-deceased son and the widow of a pre-deceased son's pre-deceased son. It also gives them a very high rank in the line of heirs in that they are permitted to share the inheritance along with the widow and the sons, grandsons, and great-grandsons of the deceased superseding even his daughter and daughter's son. Though the wording of S. 2, that the provisions of S. 3 the section which confers the rights specified *supra* shall notwithstanding any rule of Hindu law or custom to the contrary apply where a Hindu dies intestate leaving a widow, seems to suggest that S. 3 may not apply where the deceased had left no widow but only the widow of a pre-deceased son or the widow of a pre-deceased son's pre-deceased son, either exclusively or along with his lineal male descendants, still, reading S. 3 as a whole it is clear that the provisions of the Act will equally apply in all the above cases.

As regards the *quantum* of interest which these heirs take, the Act makes it clear that the widow is to have the same share as a son. The widow of a pre-deceased son will take the share of a son of the deceased if no son of her own husband survived the deceased; otherwise she will take the share of a son's son. A similar provision is made as regards the share of the widow of the pre-deceased son's pre-deceased son.

By sub-S. 3 of S. 3 it is provided that the widow, the pre-deceased son's widow, and the widow of a pre-deceased son's pre-deceased son shall have a right to call for a partition after the inheritance has fallen in.

Where the deceased had an interest in undivided joint family properties the Act lays down that his wife can represent him *quoad* such properties and shall be entitled as against the other members of the coparcenary, be they collaterals or lineal descendants or ascendants, to call for a partition and obtain her husband's share in such properties.

The Act further provides, that whatever be the character of the property which the widow gets on her husband's death, it is only the limited or qualified estate usually known as a Hindu Woman's estate, an estate of enjoyment only without any power of disposition normally, that she will have therein.

Difficulties in Construction.—Such in brief are the changes made. Unfortunately the Act has afforded room for much controversy both as regards the spirit underlying it as also with reference to the interpretation of its provisions. It might thus be urged that there is absolutely no justification for superseding the daughters in the line of heirs by the widow of the pre-deceased son and the widow of the pre-deceased son's pre-deceased son. The daughter is of the very flesh and blood of the deceased and bound to him by ties of natural affection; while *ex hypothesi* the widowed daughter-in-law has no such paramount and compelling reason in her favour. Another criticism to which the Act is open is that it perpetuates the distinction between female heirs and others obtaining for long in Hindu Law by specifically enacting that the female heirs mentioned in the Act shall take only the limited interest known as a Hindu Woman's estate. In Hindu Law itself it has been felt that the doctrine of limited estate for female heirs was the result of the early contact of the European Judges with the doctrines of the Dayabhaga and the erroneous impression entertained by them as to its place among the authoritative treatises expounding the principles of law applicable to the Hindus. In view of the subsequent recognition by the Privy Council that it is the Mithakshara which "is respected all over India" (*Buddha Singh* v. *Laltu Singh*[1]) and in view of the fact that by its comprehensive definition of stridhana taking in inherited property as well as property coming to a woman on a partition as her absolute property, the Mithakshara has "placed women almost on a footing of equality with men as regards their capacity to hold property" (*Salemma* v. *Lutchmana Reddi*[2]) and having regard to the changed conditions of Hindu social life the perpetuation of the theory of limited estate for women in inherited property seems to be absolutely indefensible.

The Act does not define clearly the tenure in which a widow inheriting the property of the deceased along with his lineal descendants will hold it. From the expression "in like manner as it devolves upon a son" in S. 3 (1) it has to be understood that the tenancy will be either a joint tenancy or

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1. (1915) 29 M.L.J. 434: L.R. 42 I.A. 208: I.L.R. 37 All. 604 (P.C.)
2. (1897) 8 M.L.J. 14: I.L.R. 21 Mad. 100.

tenancy-in-common with the co-heirs according as the latter were undivided or divided at the moment the succession fell in and according as the parties were governed by the Mithakshara or the Dayabhaga. Thus in all provinces subject to the Mithakshara law, if after inheriting the property as joint tenants and before any partition is effected among the co-heirs, any of them dies, whether it be the widow or any of the lineal descendants of the deceased, the interest of such co-heir would survive to the rest. Where however the co-heirs had taken the inheritance as tenants-in-common, then on the death of the widow subsequently, she having only a life estate under the Act, succession will once again open to her husband and his heirs at that time would succeed to such interest.

The Act abrogates the rule of Hindu Law that chastity is a *sine qua non* to a widow's heritable capacity. At the same time it creates a position of some difficulty regarding a widow who re-marries after inheriting to her husband or becoming entitled to any interest which he may have in undivided joint family properties. It has been held by all the High Courts at any rate in cases where the widow of a Hindu contracts a re-marriage under the provisions of the Hindu Widows' Re-marriage Act, that there will be an immediate forfeiture of the estate which she had taken from her first husband. S. 2 of the latter Act states:

> "All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died."

It is clear that this penal provision will not affect any interest which the widow might become entitled to under the provisions of the Hindu Women's Rights to Property Act of 1937 in the undivided joint family properties of her husband's family. It will therefore be a matter for argument whether the provision in this last Act that the interest taken by the widow under the Act in the properties of the deceased shall be the limited interest known as a "Hindu woman's estate" would carry with it the limitation obtaining under the general principles of Hindu Law in the case of widows only, namely, that she will be divested of the properties coming to her on her husband's death, the moment she ceases to be his surviving

half or his representative in law. Again according to S. 1 of the Act of 1937 the Act is called the Hindu Women's Rights to Property Act. This seems to postulate that it is the rights of *Hindu* women only that are declared. Where prior to her husband's death the wife had become an apostate to Hinduism, no doubt by the operation of the provisions of the Freedom of Religion Act of 1850 her rights of inheritance will be saved but it will be a question of some nicety whether that Act can be construed as guaranteeing to her rights which she did not have under the Hindu Law as it stood before 1850, such as the right which is now for the first time conferred on her by the Act of 1937 to the interest possessed by her husband in the undivided joint family properties of the family of which he was a member. S. 3 (2) provides for a widow representing her deceased husband in the joint family of which he was a member *quoad* the interest which he had as such member, provided he had died *intestate.* This last term in the context is unintelligible, for, it is well known that there can be no testamentary disposition of an interest in coparcenary property possessed by a member of a Mitakshara joint Hindu family. Does the Act really contemplate the abrogation of this principle of law and seek to confer under the guise of this section a right of testamentary disposition over such interest in joint family property? Obviously to so hold would give rise to anomalies. It is well established that a member of a joint Hindu family cannot alienate his interest in coparcenary property by way of gift in Madras and Bombay and even for value in other provinces. It is equally well understood that the right of testamentary disposition is more or less co-extensive with the capacity to make a gift *inter vivos.* That being so it cannot be that what a man cannot do *inter vivos* can be done by him by a testamentary disposition. It would therefore seem that the condition in S. 3 (2) of the Act that the Hindu should have died intestate as regards his undivided interest in the joint family property is really language loosely used.

A question fraught with greater difficulty raised by S. 3 (2) is as regards the availability of the husband's interest in the joint family properties, in the hands of his widow for the satisfaction of his debts. It is a long established rule that in respect of debts contracted by a coparcener, unless the creditor

had obtained a decree and in execution thereof attached the undivided coparcenary interest of his debtor during the latter's lifetime, he cannot proceed against such interest after the debtor's death, inasmuch as survivorship operates to defeat such rights (*Suraj Bansi's* case). It is equally clear that the remedies available to a creditor in respect of the undivided coparcenary interest of his debtor are the result of purely equitable considerations and not founded upon the power of the debtor himself to deal with such interest (*Deendayal* v. *Jugdeep Narain Singh*[1]). It would thus seem that when the widow becomes entitled by virtue of S. 3 (2) to her deceased husband's interest in the coparcenary properties on his death, she takes such interest free from any liability to pay his debts. Even as such interest will not be available to the creditor when it has passed by survivorship to collateral coparceners it would seem that the same result must follow where the interest passes to the widow under S. 3 (2). There are however difficulties in accepting this conclusion. The widow takes not by survivorship but by statutory provision. The Act has laid down that the widow shall have in the property *the same interest* as the husband himself had. According to the Concise Oxford Dictionary the word *same* means "identical, not different". According to Webster it means "not different in kind, like in quality or qualities, indistinguishably alike, identical". If this is the sense in which the expression *same* is used in the Act, it is as if the Act is merely extending the personality of the husband in the person of his wife, in other words, the wife shall have exactly similar powers and liabilities *quoad* the husband's undivided interest as the husband himself had subject only to the specific limitation contained in sub-S. (3) as regards the nature of such interest for purposes of enjoyment. The Act not having exempted such interest from availability to the creditors, it seems to follow that that interest will continue to be available to them even in the hands of the widow. It is perfectly true that the Act will thus by implication be conferring on the creditors a boon. It is however to be remembered that the Hindu Law always regards the non-payment of debts as a sin and therefore scrupulously requires the payment of debts before the effects of a deceased

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1. (1877) L.R. 4 I.A. 247: I.L.R. 3 C. 198 at 209 (P.C.).